IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 209/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZAMESCO LIMITED **APPELLANT**

AND

NAKONDE DISTRICT COUNCIL **RESPONDENT**

CORAM: Muyovwe, Kaoma and Chinyama, JJS,

on the 5th November, 2019 and on the 17th February, 2023

For the Appellant: *Mr R. M. Mainza, Messrs Mainza & Co.*

For the Respondent: *N/A.*

J U D G M E N T

Chinyama, JS delivered the judgment of the Court.

Cases referred to:

1. **Mutantika & Another v Chipungu, SCZ Judgment No. 13 of 2014**
2. **Colgate Palmolive (Z) Ltd v Shemu and Others, SCZ Appeal No. 11 of 2005 (unreported)**
3. **Frederick J.T. Chiluba v Attorney General (2003) ZR 153**
4. **Khalid Mohamed v The Attorney-General (1982) Z.R. 49 (S.C.)**

5. **State of Haryana and Another v. Raghubir Dayal (1995) 1 SCC 133**
6. **Official Liquidator v. Dharti Dhan (P) Ltd. (1977) 2 SCC 166**

Legislation referred to:

i. **Local Government Act, Chapter 281 of the Laws of Zambia**

ii. **Supreme Court Rules, Chapter 25 of the Laws of Zambia**

Works referred to:

a. **Craies on Statute Law, 6th edition, 1963**

b. **Chitty on Contract 25th edition**

Introduction

1. When we heard the appeal, we sat with Justice E. C. Muyovwe, JS. She, regrettably, passed on before we could deliver this judgment. The decision in this judgment is, therefore, that of the majority.

2. This is an appeal against the judgment of the High Court, dated 14th June, 2016, in which the appellant's claims were dismissed and the respondent's counterclaim upheld.

Common Background

3. In the Court below, the appellant was the plaintiff while the

respondent was the defendant. In this judgment, however, we shall call the parties by their appeal designations. The claims related to a memorandum of understanding (MOU) executed on the 27th of October, 2010 and 28th October, 2010 between the appellant, an operator of a dry port terminal on plot 1501, Nakonde and the respondent, a local authority established under the Local Government Act, Chapter 281 of the Laws of Zambia (hereinafter called "the LGA"). By virtue of the said MOU, the appellant was required to pay to the respondent, the sum of K4,000 (now K4) special levy for each motor truck parking in its terminal per day/night. The MOU took effect on 1st November, 2010 and was intended to be renewable every five years up to 2030.

4. On 16th January, 2013 the respondent, by resolution of its Establishment, Licensing, Finance and General Purposes Committee (ELFC) issued a public notice imposing a 20% levy of the parking fee charged by the appellant for each truck parked in its dry port. This was to be with effect from 1st May, 2013, and seemed to have replaced the K4 special levy hitherto

imposed by the respondent on each truck parking in the appellant's dry port per day/night.

5. On 31st October, 2013, the appellant wrote to the respondent advising that it was terminating the MOU which it understood was the basis, even for the 20% levy on the parking fees. It was alleged that the respondent had not complied with the requirements of the LGA. By the time of the termination letter, the appellant had paid to the respondent a total of K2,343,863.84 made up of the sum of K837,809.84 under the MOU and K1,506,054.00 under the public notice.
6. The respondent reacted by writing to the appellant on 7th November, 2013, advising that the respondent was mandated to impose fees and charges under section 70 of the LGA. This was followed on 26th March, 2014, with a letter to the appellant, demanding payment of unpaid parking levies amounting to K388,741 for the months of August, September, October and November, 2013.
7. On 27th May, 2014, the appellant wrote back disputing the claim for the sum of K388,741 and advised the respondent of the commencement of legal proceedings in the High Court

wherein they demanded (among other reliefs) refund of the sum of K2,343,863.84 as well as declarations: that the MOU was illegal and null and void for contravening section 69 (1) (a), (b), (c) and (2)(a) of the LGA; and that the public notice contravened section 70(1)(a), (b) and (2) of the same LGA. The respondent, in turn, disputed the claims and counterclaimed against the appellant for payment of the sum of K388,741.00 in unpaid parking levies.

The issue before the High Court

8. The bone of contention in the court below was the interpretation of, primarily sections 69 and 70, of the LGA, with regard to the power of the respondent to impose the stated levies. The relevant provisions of the two sections state -

> **69. (1) A council <u>may</u> make by-laws imposing all or any of the following levies:**
> **(a) a levy on leviable persons owning or occupying property or premises situated within the area of the council;**
> **(b) a levy on leviable persons carrying on a business, trade or occupation within the area of the council;**
>
> **(c) ...**
>
> **(2) By-laws imposing a levy <u>may</u>-**
>
> **(a) make different provision with respect to different classes of property or premises, different classes of**

businesses, trade or occupations and different classes of commodities;

... (underlining supplied)

(5) For the purpose of this section, "leviable person" means-

(a) any person apparently of or above the age of eighteen years; and

(b) any body of persons, corporate or unincorporate.

70. (1) A council <u>may</u> impose fees or charges payable to the council:

(a) for any licence or permit issued under any by-law or regulation made under this Act;

(b) for any service or facility provided or goods or documents supplied by the council in pursuance of or in connection with the discharge of any function of the council.

(2) All fees and charges imposed by a council under the section <u>shall</u> be regulated by by-law or, if not so regulated, <u>may</u> be imposed by resolution of the Council:

... (underlining supplied)

<u>The appellant's case</u>

9. It was contended on behalf of the appellant that in order for the respondent to collect the K4 parking levy under the MOU, the respondent should have made a by-law required under section 69 of the LGA. Further that, in order to collect the 20% of the parking levy under the public notice, the respondent should have equally made a by-law or passed a resolution required under section 70 of the LGA.

10. It was argued, accordingly, that the K4 levies under the MOU were irregular as the MOU did not constitute a by-law and that it was entered into in breach of section 69(1)(a), (b) and (2)(a) of the LGA. It was argued, further, that the imposition of the 20% levy on the parking fee was in breach of section 70(1) (a), (b) and (2) of the LGA as the public notice was not backed by a by-law; and in any case that the resolution of the respondent's ELFC had nothing to do with the issuance of a licence or permit or the provision of any facility, or the supply of goods or documents by the respondent in pursuance of or in connection with the discharge of its functions as a Council required under the section. It was also pointed out that Stand No. 1501 on which the dry port was situated was owned by the appellant under title issued by the Registrar of Lands and Deeds (dated 28th May, 2012 but effective from 1st October, 2011). Further, that the imposition of the levy was discriminatory as the appellant was the only entity singled out for it.

The respondent's case

11. The respondent's defence was that it was empowered under the

LGA to impose levies, fees and charges and to enter into a special arrangement as it did with the appellant and did not breach any of the cited provisions. Regarding the ownership of plot 1501, it was contended that the land belonged to the respondent and that the purported claim of ownership by the appellant was under investigation by the Anti-Corruption Commission (ACC) on the basis that the land was irregularly acquired by the appellant. It was also denied that the collection of the monies from the appellants was discriminatory as other businesses within the respondent's area of jurisdiction were also paying levies. In its counterclaim, the respondent urged the Court to award damages and interest in addition to the claim of K388,741.00

Consideration and decision of the case in the High Court

12. The Court summed up the issues to be resolved as being: whether the MOU was illegal, null and void for contravening the LGA; whether the respondent could impose a special levy on the appellant through the public notice and not a by-law (or a council resolution); whether the appellant was entitled to a

refund of the monies paid pursuant to the MOU and the public notice.

13. In resolving the issues, the Court construed sections 69 and 70 of the LGA. In relation to section 69, the learned judge noted the use of the word "*may*" rather than the word "*shall*" in the provision and held that the duty to make by-laws was discretionary and not mandatory. She cited the case of **Mutantika and Another v. Chipungu**[1] in which the Supreme Court, in relation to Rules 70(1), 71(1)(a) and 58(5) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, held that the word "*may*" in the provisions conferred discretionary power while the word *"shall"* was mandatory. The learned judge accordingly took the view that the respondent was not obliged or mandated to make a by-law to levy the K4 per truck per day/night parked in the appellant's dry port. According to the learned judge, the respondent had "*discretion to make by-laws when levying businesses such as the plaintiff or not to.*" She noted that from the wording of the MOU, it was clear that the parties agreed to be bound by its terms and relied on the case of **Colgate Palmolive (Z) Ltd v Shemu and Others**[2] regarding

the need to respect and enforce contracts entered into by persons of full age and competence. Therefore, the court held that the appellant was bound by the MOU which it freely signed. The case of **Frederick J.T. Chiluba v Attorney General**[3] was also cited for the principle, in an action for judicial review, that a public authority's action will not be held to be illegal unless the decision-

> **"contravened or exceeded the terms of the law which authorised the making of that decision or that the decision pursues an objective other than that for which the power to make the decision was conferred. By looking at the wording of the power and the context in which the power is to be exercised, the court's ultimate function is to ensure that the exercise of the power is within or intra vires the statutes".**

14. The learned judge reasoned based on the foregoing that bearing in mind the discretion to make or not to make a by-law and the respondent's mandate to collect revenue, through the imposition of levies, fees and charges, the respondent was not doing anything illegal by imposing the special levy on the appellant via the MOU. Therefore, the respondent acted *intra vires* the LGA. The learned judge also took the view that the appellant could not terminate the MOU because the MOU did not provide for termination by notice. She stated that the MOU

could only be terminated by non-renewal under its terms at the expiry of the renewable period of 5 years.

15. On the issue of whether the ownership of land affected the respondent's ability to impose levies, the judge stated that it was immaterial that the appellant owned the land as the respondent could impose a levy on a person simply for carrying on business within its area. This, according to the learned judge, was as provided for under section 69(1)(a) and (b) of the LGA. The learned judge stated, in any case, that her view was that the appellant had not proved that it owned the land in view of the investigation that was being conducted by the ACC in the matter. The judge refused to declare that the MOU was illegal and null and void.

16. Turning to section 70 of the LGA, the learned judge again took the position that the section is not mandatory. The judge noted that under section 70(2), fees and charges may be imposed under a by-law or by resolution of the Council. She stated that according to DW1, the respondent imposed the 20% levy after a resolution of the Council (respondent) which then issued a public notice.

17. On the issue of discrimination, the learned judge took the position that the respondent had power under sections 69 and 70 to impose fees, levies or charges, a matter which the appellant had not opposed or objected to on the ground that this (law) was discriminatory. On this account, the judge held that the appellant had failed to prove that the respondent's action was discriminatory and contravened section 70(1)(a), (b) and (2) of the LGA. Therefore, it was not entitled to a refund.

18. On the converse, the judge found that the counterclaim had merit on the ground that the respondent had power to impose the levies. She upheld the counterclaim and awarded interest from the date of the counterclaim to the date of judgment at the short-term deposit rate, and thereafter at the Bank of Zambia current lending rate till full payment. She also awarded costs to the respondent.

This appeal

19. The appellant being dissatisfied with the judgment, appealed to this Court setting down three grounds of appeal as follows-

1. The court below misdirected itself in law when it held that the defendant acted *intra vires* the Local Government Act when it

entered into a MOU with the plaintiff for purposes of levying the plaintiff a special levy of K4,000.00 per truck passing through its terminal per day/night.

2. **The court below misdirected itself in law when it held that the defendant was empowered under section 70 of the Local Government Act to impose a charge or parking levy of 20% on the plaintiff.**

3. **The court below misdirected itself in law and fact when it held that the defendant's counter-claim had merit in the face of evidence that the demand of K388,741.00 was made after the termination of the Memorandum of Understanding.**

Submissions for the appellant

20. Counsel for the appellant filed heads of argument in support of the appeal on which learned Counsel relied at the hearing of the appeal.

21. In respect of ground one, Mr Mainza argued on the premises that in light of sections 69, 70 and 76 of the LGA, which gives Councils authority to make by-laws for the good rule and management of the areas under their jurisdiction, Councils have a statutory duty to make by-laws to enable them discharge their functions. It was contended, therefore, that the holding that the respondent has discretion to make or not to make by-laws is in conflict with the law.

22. In relation to whether the MOU could be enforced on the basis that it was a contract freely entered into by the parties, Mr Mainza submitted that the MOU did not satisfy sections 63 and 64 of the LGA which, while permitting Councils to enter into contracts, requires that this should be under standing orders, made to regulate the process. It was pointed out that there was no evidence that standing orders had been made as required by section 64. For ease of reference the two sections state in the relevant portions-

> **63. (1) A council may enter into contracts necessary for the discharge of any of its functions.**
>
> **(2) All contracts made by a council shall be made in accordance with the standing orders of the council and, in the case of contracts for the execution of works or the supply of goods or materials, the standing orders shall-**
>
> **(a) require that, except as otherwise provided by or under the standing orders, notice of the intention of the council to enter into the contract shall be published and tenders invited; and**
>
> **(b) regulate the manner in which such notice shall be published and tenders invited.**
>
> **(3) A person entering into a contract with a council shall not be bound to inquire whether the standing orders of the council which apply to the contract have been complied with, and all contracts entered into by a council, if otherwise valid, shall have full force and effect notwithstanding that the standing orders applicable thereto have not been complied with.**

> **64. (1) Subject to the provisions of this Act, a council may make standing orders-**
>
> **(a) for regulating the proceedings and business, and for preserving order, at meetings of the council, a committee or a sub-committee;**
>
> **(b) for regulating the entering into of contracts by the council.**

23. It was submitted, based on the foregoing that the learned judge in the court below fell into error when she held that the respondent acted *intra vires* the LGA when it entered into the MOU with the appellant. To the contrary, the imposition of the K4 special levy offended the requirements of the law rendering the MOU to be null and void. Counsel's prayer was that we reverse the finding by the court below.

24. Pertaining to ground two of the appeal, the thrust of the submission was that under section 70 of the LGA, Councils are mandated by law to impose fees and charges for licences or permits issued by the Council and for any service or facility provided by the Council or for goods and documents supplied by the Council and the imposition of such fees and charges is regulated by a by-law or a resolution of the Council. It was contended that parking fees could only be charged by the

respondent pursuant to powers vested in it by section 70(1)(a), (b) and (2), of the LGA where the facility or premises used belonged to the respondent, and not when the facility or premises was privately owned. It was pointed out that, in this case, there was no evidence that the respondent had issued the appellant with any licence or permit or provided any service or facility to warrant the charging of the fee. Further, that there was no evidence on record to show that the facility or premises belonged to the respondent.

25. On the issue of discrimination in imposing the 20% parking levy, the submission was that the appellant was the only company which was being charged the levy. For support, reference was made to the evidence of DW1 that only the appellant appeared in the notice as the company that was being levied the 20% when fees are supposed to be uniform.

26. It was, therefore, submitted that the trial judge totally misconstrued section 70(1)(a) and (b) of the LGA and failed to appreciate that under that section, a Council must provide services mentioned in paragraphs (a) and (b) to justify the imposition of the parking levies.

27. Regarding ground three relating to the respondent's counterclaim, the short submission was that since the appellant had terminated the MOU; coupled with the fact that the parking levies were being illegally charged, the appellant is not obliged to pay the sum being claimed by the respondent. It was also submitted, regarding the argument that the MOU could not be terminated in the manner done because there was no provision for that mode of termination, that there was no law which prohibits the termination of such a contract. That the trial judge fell into error when she held that the appellant could not terminate the MOU because there was no provision for termination by those means. We were urged to quash the judgment of the High Court in its entirety and uphold the appeal with costs to the appellant.

Submissions for the respondent

28. The respondent was not represented at the hearing of the appeal and there were no heads of argument filed in response to that of the appellant. The absence of the respondent at the hearing and their failure to file heads of argument in response,

notwithstanding, we are still compelled to consider the merits of the appeal and to see whether there is need to interfere with the judgment of the High Court. This is on the footing of what we said in the case of **Khalid Mohamed v The Attorney-General**[4] that-

> **"A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case".**

Put more succinctly, in relation to the issue of non-filing of heads of argument in opposition, a Court cannot automatically accept a party's arguments just because there are no arguments in opposition; the Court has to be convinced on the whole of the case.

Consideration of the appeal and our decision

29. We have considered the appeal together with the judgment of the High Court appealed against, and the submissions in support of the appeal. The issues in this appeal are not different from those that were before the High Court viz: whether the MOU was illegal, null and void for contravening the LGA; whether the respondent could impose a special levy on the appellant through the public notice and not a by-law or Council

resolution; and whether the appellant is entitled to a refund of the monies paid pursuant to the MOU and the public notice. Each one of these issues speak to the respective grounds of appeal. We will deal with each issue in turn.

Whether the MOU was illegal and null and void for contravening the LGA.

30. The issue to decide is whether the use of the word 'may' in section 69(1) of the LGA, confers a discretionary power on a Council to make by-laws before imposing the levies permitted in the provision or not to do so as found by the learned trial judge. In other words, can a Council impose a levy under the said provision without making a by-law?

31. At first glance, section 69 appears to be directory or permissive with regard to the requirement for a Council to make by-laws imposing the levies specified in the enactment. This is because as stated in the **Mutantika**[1] case, the use of the word 'may' in the subject provisions conferred discretionary power. However, this construction is only permissible if it does not make the

provision ineffective, bearing in mind, particularly, that all legislation is enacted for a purpose. To, therefore, construe the word "may" as conferring discretion to do or not to do what is required when the context of the provision does not support that construction would make the provision ineffective.

32. In our understanding of section 69(1) of the LGA, the use of the word "may" in the context of the enactment denotes a mandatory or an obligatory requirement that whenever a Council decides to impose a levy, it must make a by-law for that purpose. Without the by-law, no levy can be imposed. In the Indian case of **State of Haryana and Another v. Raghubir Dayal**[5], it was held by the Division Bench of the Supreme Court that-

> **"... it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory".**

Section 69 was clearly enacted for the purpose of enabling Councils to collect revenue through the imposition of levies. However, to impose a levy, the Council is required to make a by-law. The by-law is, then an essential formality to the imposition

of the levy. As already stated, without the by-law, neither of the levies permitted under paragraphs (a) and (b) of section 69(1) of the LGA can be imposed. In the foregoing sense, therefore, the requirement for a by-law, notwithstanding the use of the word 'may' which ordinarily denotes discretion, can only be mandatory.

33. That the word 'may' can denote obligation, in certain circumstances, has long been recognised. The authoritative old textbook, **Craies on Statute Law,** 6th edition illustrates, at page 285, that-

> **"... so long ago as the year 1693, it was decided in the case of R v Barlow[41], that when a statute authorises the doing of a thing for the sake of justice or the public good, the word "may" means "shall" ..."**

34. Another Indian case of **Official Liquidator v. Dharti Dhan (P) Ltd[6]**, decided by the Division Bench of the Supreme Court also sheds light on the matter as follows-

> **"In fact, it is quite accurate to say that the word 'may' by itself, acquires the meaning of 'must' or 'shall' sometimes. This word, however, always signifies conferment of power. That power 'may', having regard to the context in which it occurs, and the requirements contemplated for its exercise, have annexed to it an obligation which compels its exercise in a certain way on**

facts and circumstances from which the obligation to exercise it in that way arises. In other words, it is the context which can attach the obligation to the power compelling its exercise in a certain way. The context, both legal and factual, 'may' impart to the power that obligatoriness".

35. Based on these two illustrations, it is clear that the word 'may' does not always denote discretion. Depending on the circumstances or context of the enactment or provision, it can convey a mandatory or obligatory requirement. The case of **Mutantika**[1] was obviously decided in the context of the provisions concerned and is not a general authority that in all cases, the appearance of the word 'may' in an enactment or provision denotes discretion to do or not to do.

36. It is clear from the respondent's testimony, that the respondent did not make any by-law before imposing the K4 levy. DW1, who had been the respondent's Council Secretary for four years at the time of his testimony, told the court below that he was not aware that the council was supposed to pass a by-law. This confirmed that there was in fact no such by-law made prior to the signing of the MOU.

37. As we have said in paragraph 25 above, section 69 was enacted to enable councils collect revenue through the imposition of levies. To do so, the Council is required to make a by-law which is an imperative formality prescribed by statute. Without the by-law, none of the levies permitted under paragraphs (a) and (b) of section 69(1) of the LGA can be imposed.

38. From the foregoing, it is clear that the MOU was illegal and, therefore, null and void for contravening provisions of the LGA. Accordingly, we find that the learned trial Judge misdirected herself when she held that the respondent had the discretion to make or not to make by-laws.

39. The conclusion in the preceding paragraph then renders a consideration of the issue whether the MOU can be enforced as a contract within the remit of sections 63 and 64 of the LGA otiose. It is clear to us that the respondent purportedly set out to execute the MOU under the perceived authority granted in section 69 of the LGA. It cannot, therefore, be argued that the MOU was in the nature of a contract permitted under sections 63 and 64 of the LGA. In any case, the contracts referred to under the two sections are those listed in the second schedule

to the LGA and the imposition of parking levies is not among them. Further, as contended by Mr Mainza, the respondent had not shown that it had complied with the requirement to make standing orders to regulate the contract. The two sections, which we have reproduced in the material parts at paragraph 15 above, carry a similar import as section 69. It is a mandatory requirement, once a Council decides to enter into any contract, to issue a standing order. Notwithstanding section 63(3), which provides that a party entering into a contract with the Council is not bound to inquire whether the standing order has been complied with, the point in this case, is that there was no standing order made at all. Just as in the case of the by-law to impose a levy, the standing order is an essential formality in entering into any contract by a Council. We find merit in ground one of the appeal. This brings us to the next question.

<u>Whether the respondent could impose the 20% special levy on the appellant through the public notice and not a by-law or Council Resolution.</u>

40. Section 70 gives power to Councils to impose fees and charges.

The section also uses the word 'may' which, in our view, again denotes a mandatory or obligatory requirement as opposed to a discretionary one. Section 70 (2) in fact puts the matter of obligation beyond question when it states that-

> **"All fees and charges imposed by a council under the section shall be regulated by by-law or, if not so regulated, may be imposed by resolution of the council".** (Underlining supplied)

41. Our understanding of the provision, is that a Council is permitted to impose fees and charges for the purposes enumerated in the provision either by way of a by-law or a council resolution. In the instant case, the respondent, as in the case of the K4 levy, did not make a by-law. There was, however, alleged to have been passed a resolution referred to in the public notice dated 16th January, 2013 which stated as follows:

> **"Fees/Charges – 2013**
>
> **Under the Local Government Act, Cap 281 sections 69, 70 of the Laws of Zambia, the Council has been mandated to impose fees and charges. The Council under Minute No. Establishment, Licensing, Finance and General Purposes Committee (ELFC) 14/02/11 reviewed the fees and charges upward with effect from 1st May, 2011 as follows..."** (underlining supplied)

42. Curiously, the notice bears a stamp dated 16th January, 2013 but indicates that the fees that had been reviewed upward were effective from 1st May, 2011. Furthermore, the public notice refers to loading fees and charges but specifically named the appellant for parking fees as follows: *"Parking fees (dry port) K4,000.00 20% Zamesco"*.

43. While it is not in contention in this appeal that the public notice came about as a council resolution, the subject matter, i.e., the imposition of the parking fee (preferably, levy) does not come within the contemplation of section 70 (1)(a), (b) and (2), of the LGA. In that provision, the charges and fees permitted are confined to a permit, licence, services, facility, goods or documents supplied by the respondent (see paragraph 8 above). Applying the *ejusdem generis* rule, the things for which a Council can impose fees and charges do not include parking fees in a dry port. Clearly, the Council contravened section 70, of the LGA when it resolved to impose the 20% levy on the appellant for each truck parked in the appellant's dry port per day/night. The special levy was not one of the items permitted under the provision for which fees or charges can be imposed.

The special levy imposed under the public notice was, therefore, illegal and null and void. We, accordingly find that the trial judge again misdirected herself when she upheld the respondent's decision to impose the levy. There is merit in ground two of the appeal.

44. Regarding the issue of discrimination, our view is that there was no material to support the existence of the tort. The public notice issued pursuant to the resolution of the Council does not show that there were other operators offering parking services who were treated more favourably than the appellant. What the notice shows is simply a list of loading fees/charges wherein the appellant is singled out for a parking fee. There is, clearly no one or other entity to compare with. Given the wording of section 69(2)(a) (see paragraph 8, above) which permits by-laws imposing a levy to make different provisions with respect to, among other things, different businesses, the respondent would have been within the law had the levy been for a purpose permitted under the statute. In the result the allegation of discrimination is unfounded.

45. On the question whether, the appellant could "terminate the contract" in the manner done, it is clear from the conclusion that we have reached in paragraph 39 to the effect that the MOU was not a contract in terms of sections 63 and 64 of the LGA, that the issue of termination does not arise. If there was no contract, there was nothing to terminate. Consequently, the argument whether or not the appellant properly terminated the MOU falls by the way-side. This conclusion, however, does not affect the fact that there is merit in the second ground of appeal. We now move to the last issue.

Whether the appellant is entitled to a refund of the monies paid pursuant to the MOU and the public notice.

46. The effect of our decision that the respondent contravened the LGA when it imposed the special levies of K4 and later 20% of the parking fee is, on the one hand, that the appellant was made to pay money which it was not supposed to: On the other hand, the respondent gained money which under the prevailing law it was not supposed to. In the result, the appellant was made to unjustly lose money while the respondent unjustly gained

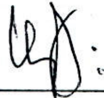
money. In circumstances where one party is enriched at the expense of another, equity regards the occurrence as unjust enrichment. Where a party is unjustly enriched, the law imposes an obligation upon the beneficiary to make restitution.

47. The learned trial judge misdirected herself in law when she found that the appellant was not entitled to any refund. Although in the case of **Khalid Mohammed v Attorney General**[4] this Court emphasised that the appellate court should not lightly reverse findings made by the trial court, we find this a proper case to disturb the findings of the trial judge on the basis of our conclusions on the undisputed facts.

48. On the totality of the evidence, we find the appeal has merit in the second ground as well. Ultimately, the appeal is successful. We accordingly reverse the judgment of the court below and order the respondent to refund the appellant the sum of K2,343,863.84, which is made up of K837,809.84 paid as special parking fee or levy for the period between 24th April, 2012 and 24th September, 2013, pursuant to the MOU and K1,506,054.00 under the public notice. We further award interest at the short term deposit rate from the date of writ to

date of judgment and thereafter at the current lending rate as determined by the Bank of Zambia from time to time until final settlement. Costs are for the appellant both in this Court and in the court below.

R. M. C. KAOMA
SUPREME COURT JUDGE



J. CHINYAMA
SUPREME COURT JUDGE